Practice considerations in TBI Cases

Sally G. Kelsey & William Townsley

NOTICE

- **Universal Citation:** KS Stat § 44-520 (2014)

- **44-520. Notice of injury.** (a) (1) Proceedings for compensation under the workers compensation act shall not be maintainable unless notice of injury by accident or repetitive trauma is given to the employer by the earliest of the following dates:

- (A) ***20 calendar days from the date of accident or the date of injury by repetitive trauma***;

- (B) if the employee is working for the employer against whom benefits are being sought and such employee seeks medical treatment for any injury by accident or repetitive trauma, ***20 calendar days from the date such medical treatment is sought;*** or

- (C) if the employee no longer works for the employer against whom benefits are being sought, 10 calendar days after the employee's last day of actual work for the employer.

- Notice may be given orally or in writing.

- (2) Where notice is provided orally, if the employer has designated an individual or department to whom notice must be given and such designation has been communicated in writing to the employee, notice to any other individual or department shall be insufficient under this section. If the employer has not designated an individual or department to whom notice must be given, notice must be provided to a supervisor or manager.

- (3) Where notice is provided in writing, notice must be sent to a supervisor or manager at the employee's principal location of employment. The burden shall be on the employee to prove that such notice was actually received by the employer.

- (4) The notice, whether provided orally or in writing, ***shall include the time, date, place, person injured and particulars of such injury. It must be apparent from the content of the notice that the employee is claiming benefits under the workers compensation act or has suffered a work-related injury.***

- (b) ***The notice required by subsection (a) shall be waived if the employee proves that: (1) The employer or the employer's duly authorized agent had actual knowledge of the injury; (2) the employer or the employer's duly authorized agent was unavailable to receive such notice within the applicable period as provided in paragraph (1) of subsection (a); or (3)*** **the employee was physically unable to give such notice.**

- (c) For the purposes of calculating the notice period proscribed in subsection (a), weekends shall be included.

Inability to articulate what occurred

The statute has apparently accommodated for the effect a traumatic accident might have on the Notice provision of the Act-

- 44-520(b)(3) Makes clear that the 20 days is suspended during any period, that 'the employee was physically unable to give such notice.'

What happens if a party is continues to be unable to describe the events of the injury in a manner which adequately covers the factors required in the Notice Statute?

- In the case of Graber v. Dillon Companies, Inc. No.113,412 (2016) there arguably could have been a notice challenge had the circumstances of the accident not been clearer.
- However, doubts regarding the cause of the accident led to a dispute as to whether the injury was a result of an 'accident' as defined. This case focused on the meaning of the term 'idiopathic'.
- **K.S.A. 44-508(d)**

"Accident" means an undesigned, sudden and unexpected traumatic event , usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.

Another issue raised in Graber v. Dillon Companies was whether the injury arose out of and in the course of employment.

K.S.A. 44-508(f)(2)

An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

In Graber v. Dillon Companies, the Court of Appeals stated:

“Under the KWCA, an injury is compensable only if it arises out of and in the course of employment. K.S.A. 2015 Supp. 44-508(f)(2). An accidental injury arises out of employment only if (1) "[t]here is a causal connection between the conditions under which the work is required to be performed and the resulting accident," and (2) "the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment." K.S.A. 2015 Supp. 44-508(f)(2)(B). Specifically excluded from arising out of employment are accidents or injuries which arise out of a neutral risk with no particular employment or personal character, a personal risk, or directly or indirectly from an idiopathic cause. K.S.A. 2015 Supp. 44-508(3)(A).

PREVAILING FACTOR

What happens when pre-existing medical conditions may impact or exacerbate a person's susceptibility to the event occurring, or the degree of injury caused by an accident?

In addition to the facts described in Graber, which included pre-existing health conditions, questions of Prevailing Factor can be based on the timing of the onset of symptoms or the reaching of a particular diagnosis.

A new Board case from February 2020 addressed this issue:

Chris Collins v. Irish Express Inc. and American Interstate Ins., CS-00-0244-569, AP00-0447-379

Involved a claimant who had fallen from a significant height onto his back, and suffered serious back injuries. In December 2017 after the fall, his Glasgow Coma score was normal. He had surgeries in April of 2018 and February 2019. Balance difficulties were reported thereafter, and a brain MRI was done on May 2019.

- The Board noted in its opinion that the claimant saw Dr. Eva Henry in September of 2019.

"He reported daily frontal area headaches since the accident, slurred speech, sleep disturbance, significantly impaired balance, mood irritability, anxiety, depression, ear ringing/tinnitus/hearing loss and dropping objects. Dr. Henry performed a physical examination and reviewed the brain MRI and a July 5, 2019 cervical spine MRI. The doctor stated, "He is showing significant cerebellar predominant symptoms and signs. He is at very high fall risk. He has significant slurred speech and cognitive impairment. He has frequent falls and near falling episodes."

The respondent argued that Collins did not exhibit any signs of a head injury following his work accident, and no medical professional evaluated, treated or diagnosed Collins for any such injury until nearly two years after the accident.

The Board in its decision found:

"Collins proved his traumatic brain injury and concussion arose out of and in the course of his employment, including the prevailing factor element. Dr. Henry is qualified to provide an opinion. She concluded Collins' accident caused a traumatic brain injury/concussion and was the cause and prevailing factor for his injury and need for medical treatment. Dr. Henry's opinions are not based on mere speculation and there is no proof of an intervening injury by accident or other cause to explain Collins' symptoms. While the valid concern exists that head injury complaints arose well after the accident, no contrary medical evidence was presented."

In reaching their conclusion and recognizing the circumstances of the delayed diagnosis, the Board cited the following case in a footnote:

Anderson v. Kinsley Sand & Gravel, Inc., 221 Kan. 191, Syl. ¶ 2, 558 P.2d 146 (1976)

"Uncontradicted evidence which is not improbable or unreasonable cannot be disregarded unless shown to be untrustworthy, and is ordinarily regarded as conclusive."

MEDICAL TREATMENT

44-510h. Medical compensation; change of health care provider; examination by alternate health care provider; faith healing; preventative hepatitis treatment; presumption of employer's obligations; termination of.

(a) It shall be the duty of the employer to provide the services of a health care provider, and such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches, apparatus and transportation to and from the home of the injured employee to a place outside the community in which such employee resides, and within such community if the director, in the director's discretion, so orders, including transportation expenses computed in accordance with subsection (a) of K.S.A. 44-515, and amendments thereto, *as may be reasonably necessary to cure and relieve the employee from the effects of the injury. (emphasis added)*

Question:

Brain injuries require various therapies around improving activities of daily living. While most are categorized as medical or occupational therapy, employer may need to provide services of non-medical providers such as reading specialists, to relieve the effects of the injury. Are ADL's such as 'reading' considered an 'effect of the injury' that the employer has a duty to cure? Is providing non-medical services needed to improve ADL's contemplated under the Act?

NATURE AND EXTENT OF DISABILITY

- ADA 4th Edition Guidelines

Brain injuries are contained in Chapter 4, “The Nervous System”. Page 139 of the Guides sets out that the chapter is organized according to the approach to the neurological examination of the patient. The sections include: Central Nervous System, the Brain Stem, The Spinal Cord, the Muscular and Peripheral Nervous Systems, and Pain.

Under this list, the Guides states, “The impairment criteria are defined in terms of the restrictions or limitations that the impairments impose on the patient’s ability to carry out activities of daily living, rather in terms of specific diagnoses.”

- ADA 6th Edition Guides

The chapter related to Brain Injury is entitled “The Central and Peripheral Nervous System” and also states that “Neurologic impairments should be assessed as they affect Activities of Daily Living. ADL’s reflect both the “basic’ and “advanced” tasks that people ordinarily perform on a daily basis.”

Ratable conditions include Dysphasia, Aphasia, Emotional and Behavioral Impairments, and migraine headaches.

PRACTICE CONSIDERATIONS

- Your client's cognitive and emotional health can impact your communication with your client. Figure out early the accommodations you need to make to improve your ability to represent them. Keep confidentiality in mind when working with a support person to aid in communicating.
- The claimant's mental capacity or speaking ability may impair their ability to successfully participate in a deposition. The claimant may become more able in the future after recovery, or the limitations imposed by cognitive or neurological impairments present may persist. A judge may provide guidance on whether a deposition should proceed and clarify parameters that accommodate the impairment.